IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

AMBER ARD **PLAINTIFF**

V. **CIVIL ACTION NO: 3:12-cv-2-TSL-JMR**

STEVE RUSHING, ET AL. **DEFENDANTS**

SHERIFF STEVE RUSHING (OFFICIALLY) AND LINCOLN COUNTY, MISSISSIPPI'S RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS FOR FAILURE TO DISCLOSE OR PRODUCE EVIDENCE AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Comes now Sheriff Steve Rushing, and Lincoln County, Mississippi, by and through counsel, and submit their Response to Plaintiff's Motion for Sanctions for Failure to Disclose or Produce Evidence and in Opposition to Defendants Motion for Summary Judgment.

INTRODUCTION

The Plaintiff initiated this action in the Circuit Court of Lincoln County, Mississippi on November 23, 2011 asserting that she was raped in the Lincoln County Jail. *Compl.* ¶ 7. The suit was removed to this Court on January 4, 2012. *CM/ECF Doc. No.* 1. Because Sheriff Rushing was sued in his individual capacity, within days of answering the Complaint, he filed a Motion for Qualified Immunity and Stay which resulted in the Court entering a stay as to all discovery except that related to Rushing's immunity defense. *CM/ECF Doc. Nos*. 5 & 8.

The parties[1] engaged in immunity-related discovery, including both written discovery and depositions. In particular, in March through May, 2012 the parties engaged in written immunity-related discovery and on May 24, 2012, the Plaintiff, Sheriff Rushing and Mr. Miller were deposed. Subsequently, on June 22, 2012, Sheriff Rushing filed his Motion for Summary Judgment which the Court granted. *CM/ECF Doc. Nos*. 25-32.

Following the Court's granting Rushing's summary judgment, the County propounded additional non-immunity related interrogatories and requests for production; however, the Plaintiff did not file additional non-immunity related discovery requests. *CM/ECF Doc. Nos*. 51-52. The County then filed its Motion for Summary Judgment. *CM/ECF Doc. Nos*. 58-59. Both parties, thereafter, submitted additional briefs on the issues, the last of which was filed by the County on November 18, 2013. *CM/ECF Doc. No*. 69.

On December 19, 2013, the Plaintiff filed her Motion to Strike asserting that the County was on notice of the allegations made by Crystal Smith—allegations that Miller engaged in conduct similar to that alleged by the Plaintiff—and that the County failed to produce a statement given by Smith to the District Attorney's Investigator. *Pl. Motion*, p. 3-4. Put simply, the Plaintiff charges that Smith spoke with the District Attorney and gave a statement to his investigator in August, 2010, making allegations against Miller

[1] At that time, the Plaintiff was represented by Barry Gilmer and Seth Little. These attorneys have since withdrawn and present counsel appeared on June 1, 2013. *CM/ECF Doc. No*. 48.

similar to those asserted in this matter and that the District Attorney and his investigator are County officials. According to the Plaintiff, the County was, "on notice" of the Smith allegations and had an obligation to disclose them to the Plaintiff because the District Attorney was aware of the same[2]. Plaintiff's allegations are simply incorrect and unsupported by evidence or the law. Plaintiff's Motion is full of speculation and conjecture but devoid of record evidence. This is because the record evidence is wholly contrary to Plaintiff's specious allegations.

ARGUMENT

Lincoln County, by way of Sheriff Steve Rushing, first became aware that Crystal Smith was alleging sexual misconduct on the part of Tim Miller on August 20, 2012. The County first came into possession of Smith's written statement on October 8, 2013. By the time the County received notice of Smith's allegations, the Plaintiff's encounter with Miller had long ago taken place. Furthermore, as explained herein, the Plaintiff clearly had knowledge that Crystal Smith had some knowledge about Miller even before the County did and also had knowledge of a statement by Smith prior to the County and Rushing did. See, i*nfra*, p. 4, fn. 3& p. 9-10.

[2] It is imperative that this Court note that the Plaintiff alleges she was raped by Miller on June 12, 2010. *Compl.* ¶ 7. Smith's statement was given to the District Attorney's Office on August 26, 2010—two (2) months and two (2) weeks AFTER the Plaintiff was allegedly raped. *CM/ECF Doc. No. 69-2*. Thus, even if this Court charged the County with knowledge of Smith's allegations when the District Attorney received the statement, which as shown below would be legally incorrect, that knowledge would not have put the County on notice of Miller's alleged sexual escapades until AFTER the date on which the Plaintiff was purportedly raped. Simply put, the Smith allegations could not put the County on notice of Miller's alleged escapades prior to Plaintiff's alleged rape and, thus, have no bearing on the issues before the Court.

I. Sheriff Rushing Became Aware of Smith Allegations on August 20, 2012.

The Plaintiff alleges that (1) Sheriff Rushing perjured himself in his deposition; (2) gave contradictory testimony in his deposition; and (3) the County failed to produce the Smith Statement in response to requests for production and initial disclosures. These contentions are meritless.

The record evidence in this matter is uncontradicted that Sheriff Steve Rushing first became aware of Crystal Smith's allegations of sexual misconduct by Miller on August 20, 2012—the day Smith filed suit in federal court. See, *CM/ECF Doc. No. 69-1, Sec. Supp. Aff. Rushing,* ¶ 6-8. When Rushing was deposed on May 24, 2012, he was asked whether or not he was aware of any alleged misconduct when inmates named "Sonya Brister Smith or a Crystal [were] in [the] Lincoln County Jail" and Rushing stated that he was "not familiar with Crystal." *Rushing Depo.*, p. 47[3]. The record evidence makes it abundantly clear that at that time—May, 2012—Rushing had no knowledge of Crystal Smith's allegations and was truthful in his deposition regarding the same. *Sec. Supp. Aff. Rushing, a*t ¶ 6-8. In fact, it would only be after Smith filed suit against Lincoln County, some three (3) months after Rushing's deposition, that Rushing and Lincoln County first became aware of any allegations of misconduct by Miller involving inmate Crystal Smith. *Id.* at ¶ 6-8.

[3] Interestingly, given that Plaintiff's counsel questioned Rushing about someone named "Crystal"—presumably Crystal Smith—at Rushing's deposition, Plaintiff's counsel clearly had information relevant to Crystal Smith when Rushing was deposed—months prior to Rushing and the County learning of Smith's allegations.

Similarly, the Plaintiff's contention that Sheriff Rushing was aware of Smith's statement to Truett Simmons, the District Attorney's Investigator, is completely contrary to the record evidence. More specifically, Sheriff Rushing has given sworn testimony that stands unrefuted that he first became aware of the existence of the Smith statement on October 8, 2013 when his attorney forwarded the same to him[4]. *Id.* at 7.

The County made its initial disclosures on February 7, 2013—some eight (8) months prior to the County becoming aware of the existence of and being given a copy of Smith's written statement. *CM/ECF Doc. No. 42; CM/ECF Doc. No. 69, 69-1.* Neither Rushing, nor the County could produce a statement that it did not possess.

It is also worth noting that while the Plaintiff contends that Ms. Smith's affidavit "verifies that Rushing knew" about Miller's alleged proclivity for sexual misconduct prior to his encounter with her, even Smith's affidavit does not say as much. To the contrary, Smith's affidavit clearly says only that she spoke to "the District Attorney for Pike and Lincoln Counties about Miller's sexual assault on [her]." *CM/ECF Doc. No. 65-1.* Smith's affidavit, like Rushing's, reveals that Smith never spoke to Sheriff Rushing about her allegations. *Id.*

Again, the competent, record evidence in this matter reveals that Lincoln County and Sheriff Rushing became aware of Smith's allegations two (2) years **after** Miller was indicted for sexual contact with the Plaintiff; two (2) years **after** Miller was terminated

[4] The statement was produced to counsel for Lincoln County by Jason Dare of the Wyatt, Tarr & Combs firm. Mr. Dare represents Tim Miller in the federal suit brought by Crystal Smith. Prior to that time, neither Allen nor Rushing were aware of the statement.

from his employment with Lincoln County; and, most importantly, over two (2) years **after** the Plaintiff was allegedly raped by Miller. *CM/ECF Doc. No. 69, p. 10*. Smith's allegations about Miller, even if true, have no bearing on this case because the Sheriff and County were not aware of them until long **after** the Plaintiff's interaction with Miller.

II. District Attorney Dee Bates is NOT a Lincoln County employee.

Given that the record evidence clearly reveals that Rushing was not aware of Smith's allegations until long after the Plaintiff's encounter with Miller, Plaintiff's argument that the County was on notice of Smith's allegations completely relies on her contention that District Attorney Dee Bates is a Lincoln County employee under the custody and control of the County. *Pl. Motion Strike,* ¶ 6, 9-10. According to the Plaintiff, Crystal Smith spoke the District Attorney for Lincoln, Pike and Walthall Counties—Dee Bates—in August, 2010 about Smith's allegations of sexual misconduct by Miller. Furthermore, on August 26, 2010[5], Smith gave a written statement containing her allegations to the District Attorney's Investigator Truett Simmons. *CM/ECF Doc. No. 69-2*. As a result, the Plaintiff, concludes that the County and Sheriff Rushing had notice of Smith's allegations "through…District Attorney" Bates. *Pl. Mot.* ¶ 9. Put simply, the Plaintiff contends that the District Attorney is a Lincoln County employee and that the County and Sheriff were put on notice of Smith's allegations through the

[5] Again, this statement was given AFTER the Plaintiff was allegedly raped.

District Attorney. There is no legal authority for this position and, in fact, the law is to the contrary.

Mr. Bates is the District Attorney for 14th Judicial District of Mississippi representing the State of Mississippi and is not a Lincoln County employee over whom the Sheriff or the Board of Supervisors has control. The Fifth Circuit has made this fact abundantly clear by stating with no ambiguity that in Mississippi, the "district attorney is considered a state official…" NOT a county official. *Brooks v. George County*, 84 F.3d 157, 168 (5th Cir. 1996). The Court explained that "the District Attorney's office is primarily state-funded, and the district attorney has the power to represent the state in all judicial proceedings." *Id.*, citing, *Crissy F. by Medley v. Mississippi Dep't of Public Welfare*, 925 F.2d 844, 849 (5th Cir. 1991); see also, Miss. Code Ann. § 25-31-11 (stating that it "shall be the duty of the district attorney to represent the **state** in all matters coming before the grand juries of the counties within his district and to appear in the circuit courts and prosecute for the **state**); *High v. Pearl River County DA*, 2012 U.S. Dist. LEXIS 159670 (S.D. Miss. Nov. 7, 2012)(cited to demonstrate that the State Attorney General's Office provides counsel for Mississippi District Attorney's when they are sued not the County). In fact, it is because the District Attorney is an official for the State of Mississippi rather than the three (3) counties he prosecutes in that the District Attorney is shielded by Eleventh Amendment Immunity. See, *Brooks*, 84 F.3d at 168. Lincoln County is not put on notice of information shared with a State official such as the District Attorney. If that were the case, the County would be on notice of information/allegations/investigations provided to the Governor, the Mississippi Bureau of Investigation, the U.S. Marshall's Service or the Federal Bureau of Investigation. This is simply not the case.

Plaintiff's allegation that the District Attorney's Investigator, Truett Smith's, knowledge of Smith's allegations and possession of a statement containing those allegations put the County on notice of Miller's alleged misconduct is similarly meritless. Contrary to Plaintiff's assertion in her Motion, Simmons is not "Lincoln County's Investigator." *Pl. Mot.*, ¶ 10. By statute, Simmons is the investigator for the District Attorney for the 14th Juridical District of the State of Mississippi, not for Lincoln County. *CM/ECF Doc. No. 69-2*. Section 25-31-9 of the Mississippi Code provides that "[a]ny **district attorney** may appoint a full-time criminal investigator."(emphasis added). The Statute further states that the "district attorney shall be authorized to assign the duties of criminal investigators regardless of the source of funding for such criminal investigators." *Id*. Simply put, Simmons is the employed by a State official, the District Attorney, NOT Lincoln County and Simmons does not report to or fall under the supervision or power of Lincoln County or Sheriff Rushing.

The fact that Mr. Simmons took a written statement[6] from Smith has no bearing on this case as the unrefuted record evidence proves that Rushing and Lincoln County

[6] Plaintiff's contention that the Smith statement was a public record is incorrect. Section 25-1-102 of the Mississippi Code states that records in the possession of that State which constitute work product of any "district attorney…shall be exempt from the provisions of the Mississippi Public Records Act of 1983." Miss. Code Ann. § 25-1-101. Thus, even had the County had knowledge that the Smith statement existed, the statement was not a "public record" as asserted by the Plaintiff.

were (1) not aware of Smith's allegations until Smith filed suit in August, 2012 (two (2) years after Smith's statement to Simmons) and (2) did not obtain a copy of the statement until October, 2013. See, *CM/ECF Doc. No. 69-1*, ¶ 6-10 (Rushing testifying under oath that prior to August 2012 he had no knowledge of the allegations being made by Smith and prior to October, 2013, had never seen or been given a copy of Smith's written statement). Thus, Plaintiff's assertion that the County had been in possession of the Smith statement since August 26, 2010 is simply not true. In light of Rushing's affidavit and Mississippi law, this assertion by the Plaintiff misstates both the record evidence and the law. The District Attorney may have been aware of Smith's allegations prior to the encounter with Miller about which the Plaintiff complains but the record evidence proves that Lincoln County and Sheriff Rushing were not.

III. There are no genuine issues of material fact.

The above makes clear that there are no genuine issues of material fact which should prevent this Court from granting the County's Motion for Summary Judgment. The Plaintiff's allegations that Rushing has given contradictory testimony are simply unsubstantiated as outlined above.

While the Plaintiff seeks to have this Court deny the Defendants Motion for Summary Judgment; strike the Defendants Reply in support of Motion for Summary Judgment; reopen discovery; strike the Defendants Answer; enter a Default Judgment; and aware attorney's fees, none of these actions are merited here. *Pls. Mot. Strike*, p. 8. While the District Attorney's office took a statement from Smith in 2010, Lincoln

County and Sheriff Rushing were not aware of that fact and were not aware of the substance of Smith's allegations until well after Plaintiff's alleged rape by Miller. See, *CM/ECF Doc. No. 69 & 69-1.*

The Plaintiff and her attorneys were clearly aware of Crystal Smith's allegations well before the County and Rushing. Plaintiff's counsel questioned Rushing about Crystal Smith months before Rushing learned of Smith's allegations through her Complaint filed in August, 2012. Furthermore, the Plaintiff and her attorneys were even aware of a written statement by Smith before the County and Rushing as the Plaintiff identified such a statement in her responses to the County's non immunity-related interrogatories which were sworn to on August 12, 2013[7]. See, *Responses*, attached hereto as Exhibit A. Plaintiff's Response to those interrogatories also negate any assertion that the County failed to disclose information and that any such failure was prejudicial to the Plaintiff inasmuch as the Plaintiff stated in her August 12, 2013 responses that Crystal Smith had discoverable knowledge of the facts of the *Ard* case and specified "[a]ll documents and records from Civil Action No. 3:12cv—583 DPJ-FKB styled "Crystal Gayle Smith vs. Lincoln County, MS" as being relevant to the *Ard* case. Clearly, the Plaintiff was (1) aware of the Smith statement and *Smith* suit in advance of the discovery deadline; and (2) in advance of the deadline for dispositive motions[8].

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[7] The Plaintiff identified the statement but said it was not in her possession and she did not produce a copy of the same. See, *Resp. to Int. No. 4*.

[8] Although the parties sought and received an extension of the discovery deadline after the Plaintiff submitted her discovery responses, the Plaintiff failed to issue any written discovery and failed to depose anyone. The Court should not allow the Plaintiff to take any additional discovery now simply because

At its core, Plaintiff's allegation is that the County was on notice of behavior by Miller prior to his encounter with her by way of Smith's conversation with the District Attorney and his investigator. However, the District Attorney is not a Lincoln County employee and his knowledge of Smith's allegations does not amount to notice to Lincoln County. Even if the District Attorney's knowledge could be imputed to the County, the written statement by Smith was taken in August, 2010—two months AFTER the Plaintiff was allegedly raped. The record evidence, as opposed to conjecture and speculation, demonstrates that Rushing and the County became aware of Smith's allegations (1) after Miller was terminated from employment with Lincoln County; (2) after Miller was indicted; (3) after immunity related discovery was complete; (4) after Rushing was deposed; and most significantly (5) after Miller's alleged rape of the Plaintiff. That evidence also reveals that the Plaintiff and her attorneys were aware of Smith's allegations prior to the County and were aware of Smith's lawsuit prior to the expiration of discover and the filing of the County's Motion for Summary Judgment. The Plaintiff's Motion must be dismissed and the County is entitled to a summary judgment in this matter.

WHEREFORE, PREMISES CONSIDERED, Sheriff Rushing and Lincoln County respectfully request this Court deny Plaintiff's Motion to Strike and grant the County's pending Motion for Summary Judgment.

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she chose not to do so within the deadlines agreed upon by the parties and set by the Court. See, *CM/ECF Doc. No. 57.*

DATE: December 20, 2013.

Respectfully submitted,

SHERIFF STEVE RUSHING (OFFICIALLY) AND LINCOLN COUNTY, MISSISSIPPI

BY: /s/William R. Allen
One of Their Attorneys

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CERTIFICATE

I, the undersigned of Allen, Allen, Breeland & Allen, PLLC, hereby certify that on this day, I electronically filed the foregoing Sheriff Steve Rushing (Officially) and Lincoln County, Mississippi's Response to Plaintiff's Motion for Sanctions for Failure to Disclose or Produce Evidence and In Opposition to Defendants' Motion for Summary Judgment with the Clerk of the Court using the ECF system which gave notice to of same to the following:

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This the 20th day of December, 2013.

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